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No. 10
IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

Appeal from the Supreme Court of Ohio

ALLIED STORES OF OHIO, INC.,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER
OF OHIO,
Appellee.

BRIEF OF APPELLEE

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ALLIED STORES OF OHIO, INC.,

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vs.

STANLEY J. BOWERS, TAX COMMISSIONER
OF OHIO,

Appellee.

BRIEF OF APPELLEE

QUESTIONS PRESENTED

1. Does the proviso contained in Section 5701.08, Revised Code of Ohio, granting exemption from personal property taxation to property of nonresidents of Ohio held in a storage warehouse for storage only, deny appellant equal protection of the laws under the Constitution of the United States?

2. If the appellant is denied equal protection of the laws under the Constitution of the United States, to what relief, if any, is the appellant entitled?

STATEMENT OF THE CASE

The facts of the case have been stipulated (R. 7-12).

The appellant is an Ohio corporation engaged in the operation of retail department stores within the state of Ohio.

The appellant has conceded the taxability of the majority of its inventory which was assessed for personal property taxation by the Tax Commissioner of Ohio. There remains in issue that portion of the appellant's inventory designated in the stipulation as Group 2 (R. 8-11). Group 2 inventory consists of merchandise sold at retail stores from stocks of merchandise maintained in such stores and transferred from warehouse to the stores for that purpose (R. 12).

Appellant contends that since property of a nonresident of Ohio which is held in a storage warehouse for storage only is specifically exempted from the imposition of the Ohio personal property tax, such property of the appellant as is designated herein as Group 2 inventory should likewise be entitled to exemption from personal property taxation.

The Supreme Court of Ohio upon consideration of this matter denied appellant's contention on the grounds that (1) it lacked the power to amend the statute by striking the phrase "belonging to a nonresident of this state;" (2) such phrase was an integral part of a separable portion of the statute; (3) by striking such separable portion the appellant's claim would fail since nonresidents would no longer be entitled to exemption from personal property taxation; and (4) based upon the court's construction of the statute, the appellant did not have a standing to obtain the relief which it sought.

SUMMARY OF ARGUMENT

1. Classification for purposes of taxation is a legislative function. If a reasonable basis for the classification exists, it does not lead to denial of equal protection of the laws.

2. If the exemption of property owned by a nonresident and held in a storage warehouse for storage only results in discrimination against the appellant, the only method of reestablishing equality of taxation is to strike the entire proviso granting the exemption to nonresidents since the phrase "belonging to a nonresident" is not separable from the proviso.

The Supreme Court of Ohio was correct in refusing to accept appellant's claim because, if the appellant was correct in its argument that the exemption granted to nonresidents denied appellant equal protection of the laws, proper rules of statutory construction require that only separable portions of a statute which are unconstitutional may be stricken and that the Court should uphold valid provisions which are separable from the unconstitutional portions; the phrase "belonging to a nonresident" is not a separable portion but is rather an integral part of a proviso. Thus, if the entire proviso be stricken, nonresidents will no longer be afforded exemption and further equal treatment will be granted to all taxpayers.

ARGUMENT

EQUAL PROTECTION

- A. The Proviso Contained in Section 5701.08, Revised Code of Ohio, does not Deny Appellant Equal Protection of the Laws Contrary to the Constitution of the United States.**

Section 5701.08, Revised Code of Ohio, during the tax year in question, read as follows:

"As used in Title LVII of the Revised Code:

"(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise; *but merchandise or agricultural products belonging to a nonresident of this state is used in business in this state if held in a storage warehouse for storage only.* Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are 'used' when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.

"(B) 'Business' includes all enterprises conducted for gain, profit, or income and extends to personal service occupations." (Emphasis added.)

The basis of appellant's claim of denial of equal protection of the laws is the proviso which is set forth above in italics.

There is no question but that the challenged exception operates equally upon all persons within the two classes which it creates. The only question is whether the classifi-

cation itself is so artificial and capricious as to deny to residents the equal protection of the laws.

Within constitutional limits the power to tax is purely legislative and the power to exempt any class of persons or property from taxation for reasons not clearly arbitrary is likewise a legislative power with which courts are not concerned. *Travelers' Insurance Company v. Connecticut*, 185 U.S., 364. The limitation engrafted on such legislative power by the equal protection provisions does not require identity of treatment, but only that the different treatments be not so disparate as to be wholly arbitrary. *Walters v. City of St. Louis, Mo.*, 347 U. S., 231, 74 S.Ct., 505.

In this regard, this Court announced in *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U. S., 527, 537, that:

"The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, * * * or if any state of facts reasonably can be conceived to sustain it. * * *"

In granting exemption to nonresident property held in storage, the General Assembly of Ohio must have determined that property of a nonresident was entitled to different treatment because such property would not likely be destined for introduction into the Ohio stream of commerce and that such property would be taxed at its destination or at the domicile of the nonresident. The fact that the classification used to attain this end may be disputed or that its effect may be opposed by argument does not mean that it violates constitutional limitations. *Heisler v. Thomas Colliery Co.*, 260 U.S., 245, 43 S.Ct., 83; *Citizens' Telephone Co. of Grand Rapids v. Fuller*, 229 U.S., 322, 33 S.Ct., 833; *Quong Wing v. Kirdendall*, 223 U.S., 59, 32 S.Ct., 192. Obviously in a particular case this theory may not be

borne out, but classification is necessarily based on the general, not the specific.

In the case of *Charleston Federal Savings & Loan Assn. v. Alderson*, 324, U.S., 182, 65 S.Ct., 624, at page 191 of 324 U.S., this Court noted: •

"It is plain that the Fourteenth Amendment does not preclude a state from placing notes and receivables in a different class from personal property used in agriculture and the products of agriculture, including livestock, and taxing the two classes differently, even though the state places them in a single class for other purposes of taxation. * * *

There are many instances of license and tax laws which favor nonresidents. They are often based on the theory that residents use certain facilities or exercise certain privileges regularly while nonresidents use such facilities or exercise such privileges only on occasions or irregularly; an example, motor vehicle license laws.

Legislative classification for purposes of encouraging industrial location has also withstood the challenge of unconstitutionality. In the main, such legislation has excepted from all taxation, for limited periods, certain industries or all industrial plants or even a particular corporation. *Williams v. Mayor and City Council of Baltimore*, 289 U.S., 36; *Crow v. General Cable Corp.*, 223 Ala., 611, 137 So., 657.

Examination of the legislative classifications sustained in the cases considered above discloses that they either attempted to produce general tax equality or that they were predicated upon economic policies. None creates indisputable divisions or classes and all produce certain inequalities. Of course, complete equality in the field of taxation is neither required nor attainable. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S., 495. Significantly, however, the result sought in each instance was within

the legislative purview and the distinctions drawn to this end were not palpably unfounded.

In *Madden v. Kentucky*, 308 U.S., 83, 88, it is observed:

"* * * Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. * * *

It is submitted that there has been no showing that there exists a hostile discrimination against appellant.

Conclusion

The exemption from personal property taxation accorded property of a nonresident when held in a storage warehouse for storage only does not deny to the appellant equal protection of the laws since there exists a reasonable basis for the distinction in treatment and since there is no hostile or oppressive discrimination against persons or classes.

B. Assuming That the Appellee's Position on the Question of Reasonable Classification is Not Well Taken, the Appellant is Still not Entitled to Tax Exemption.

Assuming arguendo that there exists an unconstitutional discrimination against the appellant or, stated another way, that the appellant has been denied equal protection of the laws, the problem then becomes, what is it about the Ohio law that causes such discrimination or denial of equal protection? Since the basis of the appel-

lant's claim is that nonresidents are afforded an advantage not granted to residents on the basis of a portion of Section 5701.08, Revised Code of Ohio, it seems to follow that careful examination must be made of that statute. The first question to be answered is, does the statute contain any separate parts or provisions? The purport of the statute is to define the term "used in business." From this definition the legislature has excluded property belonging to a nonresident when held in a storage warehouse for storage only. Thus property so held is not used in business in Ohio.

If there is unconstitutional discrimination, we must look to the cause of such discrimination. Both parties to this appeal would point to the same statutory language, the proviso granting the exemption to nonresidents. The difference of opinion arises, however, as to the following step. The appellant contends that the solution is to strike the phrase "belonging to a nonresident." It is the position of the Tax Commissioner that this language is not in and of itself a separate provision of the statute but is rather only a part of a separate provision, to wit, "but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only." It then follows that on the basis of a sound statutory construction to cure the unconstitutional character of this statute the entire proviso must be stricken.

The Supreme Court of Ohio has concurred in the Tax Commissioner's construction of this statute. It would seem that such acquiescence is dispositive of the question of statutory construction. *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 267 U.S., 552, 69 L.Ed., 785, 45 S.Ct., 441; *Dorchy v. Kansas*, 264 U.S., 286, 68 L.Ed., 686, 44 S.Ct.,

323; *W. W. Cargill Co. v. Minnesota*, 180 U.S., 452, 45 L.Ed., 619, 21 S.Ct., 423; *Tullis v. Lake Erie & W. R. Co.*, 175 U.S., 348, 44 L.Ed., 192, 20 S.Ct., 136.

Section 1.13, Revised Code of Ohio, reads in full as follows:

"Each section of the Revised Code and every part of each section is an independent section and part of a section, and the holding of any section or a part thereof to be unconstitutional, void, or ineffective for any cause does not affect the validity or constitutionality of any other section or part thereof."

It is an elemental rule of statutory construction that a statute may be constitutional in one part and unconstitutional in another and if the invalid part is separate from the rest of the statute the portion which is constitutional may be retained while that which is unconstitutional is stricken. It would appear that the decision as to whether constitutional portions of the statute should be upheld is primarily one of legislative intention.

The Ohio General Assembly has enacted a complete system of state taxation of personal property. Section 5709.01, Revised Code of Ohio, requires that all property located and used in business in Ohio be subject to taxation. The General Assembly defined "used in business." Section 5701.08, Revised Code of Ohio. If an exclusion from the legislative definition of "used in business" is unconstitutional, the remaining portion of the definition statute which is complete may be given continuing effect. The remaining portion is sufficient to accomplish the purpose of the statute; a complete method of taxation exists. *Ft. Smith v. Scruggs*, 70 Ark., 549, 69 S.W., 679; *Stillman v. Lynch*, 56 Utah, 540, 192 P. 272. *El Paso, etc., v. Gutierrez*, 215 U.S., 87, 54 L.Ed., 106, 30 S.Ct., 21.

In 1931 the General Assembly of Ohio enacted 114 Ohio Laws, 714, 716, which defined "used in business." Two years later the proviso under discussion was enacted. 115 Ohio Laws, 548, 553. This, it is submitted, is another indication that the proviso is not an essential part of the elemental law and that the law can stand without the proviso. It is also clear indication that the legislature would have enacted the statute with the unconstitutional part stricken therefrom.

It would seem that the rule applicable to the separability of constitutional and unconstitutional provisions would be particularly significant when the separable portion was enacted as an amendment to the basic law.

We must look finally to the standing of the appellant before this Court. In order to equalize appellant's treatment, the only solution appears to be that announced by Judge Taft in *Allied Stores of Ohio, Inc., v. Bowers*, 166 Ohio St., 116. Judge Taft refused to accept appellant's argument because if the appellant was correct in concluding that there was unconstitutional discrimination, then the solution would be to strike the separable portion of the statute. To do otherwise would be to extend an exemption from taxation. Taxation is the rule; exemption the exception. Judge Taft observed that if the entire proviso is stricken, then the appellant's claim would fall because non-residents would no longer be afforded an exemption and there would be no discrimination.

The appellant argues that in order to correct the discrimination against it the proper procedure would be to grant exemption from taxation to it. However, this would require that an exemption be extended and that the Court exercise, in effect, a legislative function. Additionally, this solution would result in a peculiar type of equality. The Supreme Court of Ohio has commented on this type

of equality in the case of *The Cleveland Trust Company v. Lander, Treas.*, 62 Ohio St., 266, at page 268:

"* * * If the county auditors have been derelict in their duties, as to the taxation of banks, bankers, banking associations or the stock or shares of such corporations, the proper remedy is not to still further transgress the law by remitting still other taxes in a vain effort to secure equality, but by bringing all up to the standard of the statute, and thereby securing equality of taxation as near as may be. * * *"

CONCLUSION

If appellant has been denied equal protection of the laws the following conclusions are submitted:

1. The cause of such unconstitutional discrimination is the entire proviso contained in Section 5701.08, Revised Code of Ohio, and not merely one word or one phrase of the proviso.

2. The proviso as a whole is separable from the other portions of the statute.

3. Section 1.13, Revised Code of Ohio, is consistent with the accepted rules of statutory construction and provides that each section of the Ohio Revised Code and each part thereof is an independent portion so that the holding of any section or part of a section of the Ohio Revised Code unconstitutional does not affect the constitutionality of the remainder.

4. The Ohio Supreme Court determination on the question of statutory construction is dispositive.

5. The Ohio General Assembly has enacted a complete scheme of taxation of all personal property located and used in business in Ohio.

6. Whether the subjective test, the legislative intent, or the objective test, the ability of the statute to continue to,

operate in furtherance of its purposes, is applied, the result is that the proviso is separable.

7. The Supreme Court of Ohio was correct in refusing to grant relief to the appellant.

Respectfully submitted,

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APPENDIX**Section 5709.01, Revised Code of Ohio.**

All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state, whether or not used in business, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property.